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IN THE

Supreme Court of the United States

October Term, 1969

No. 1183

ISIDORE ENGELMAN,

Petitioner,

against

WILLIAM CAHN, as District Attorney of the County of Nassau, State of New York, and others,

Respondents.

PETITIONER'S REPLY BRIEF

ISIDORE ENGELMAN,
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Defendants dismiss our contention that *Zwickler* v. *Koota*, 389 U. S. 244, mandates the acceptance of jurisdiction on any federal question, constitutional or otherwise. They argue that the principle enunciated in *Zwickler* is to be given only limited application, namely, to First Amendment claims. This is, of course, a complete distortion of the teachings of the case (p. 6, pet.).

Also according to the respondents, we are to be denied relief because: "There is not a single allegation in the complained based upon *Lee* v. *Florida* or Section 605 of the Federal Communications Act" (p. 6, res. brief). It is submitted that neither statutes nor precedents need be alleged in a pleading. As a matter of common knowledge, allegations of law are generally considered bad pleading. The fact is that the complaint does allege that the wiretaps

were "illegally obtained" (¶s 18, 19 & 20). This indeed is more than sufficient to allege a violation of existing federal law. Moreover, assuming *arguendo,* such allegations of precise statutes are necessary to constitute good pleading, dismissal without leave to amend is rather inequitable.

Finally, defendants argue that on the question of retroactivity, Sec. 605 questions should not be given a more favored basis than constitutional questions. We are not concerned in this matter with constitutional violations. Here, the violation of a statute (§605) is involved. That statute made it a crime to tap a telephone and reveal conversations. Even though the telephone was tapped pursuant to a state court order, the act was nevertheless criminal. Since it was a crime to tap and reveal, the exclusionary rule as a means of enforcement was never applied. In *People* v. *Kaiser,* 21 N. Y. 2d 86, 102, aff'd 394 U. S. 280, Judge Keating, writing for the majority, sums the situation up as follows:

> "Moreover, we are dealing here with the violation of a statute [605] which those charged with the primary and exclusive responsibility for its enforcement have continuously refused to enforce against State officials who, acting pursuant to State law, violate the statute. (Statement of Attorney General Robert F. Kennedy to Senate Judiciary Committee, March 29, 1962; Statement of Attorney General William P. Rogers, New York Times, Dec. 24, 1957, p. 10, col. 1.) If the statute is viable, let it be enforced. If the statute is flouted, let the offender be prosecuted. Because constitutional provisions carried no penal sanctions to discourage violation, exclusionary rules were necessary. No such problem is presented by a statute carrying penal sanctions."

In *Lee* v. *Florida,* 392 U. S. 378, this Court found as a fact that police were never prosecuted for violating Sec. 605. It therefore declared that the only way to enforce federal law was to invoke the exclusionary rule. And since the federal statute was violated on the day when the tapping took place, the Court held that the taps should not be used thereafter. Acts of legislatures are presumed to be constitutional until declared otherwise by the courts. But this is not true of statutory violations. Where a statute by its terms prohibits an act, it is the day of the violation that controls. The exclusion of evidence obtained by criminal acts is a means of enforcement of the statute. Writing for the majority in *Lee,* Mr. Justice Stewart said:

> "Finally, our decision today is counseled by experience. The hope was expressed in Schwartz v. Texas that '[e]nforcement of the statutory prohibition in §605 can be achieved under the penal provisions' of the Communications Act. 344 U. S., at 201, 97 L. Ed. at 235. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for a violation of §605 since the statute was enacted. We conclude, as we concluded in *Elkins* and in *Mapp,* that nothing short of mandatory exclusion will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States,* 364 U. S., at 217, 4 L. Ed. 2d at 1677."

In short, respondents' persistence in the intent to use illegal evidence hereafter despite this Court's bar as declared in *Lee* v. *Florida,* 392 U. S. 378, and *Fuller* v. *Alaska,* 393 U. S. 80, petitioner is plainly entitled to the protection

afforded by judicial mandate, and the petition for certiorari should be granted.

Dated New York, N. Y., March 24, 1970.

Respectfully submitted,

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Attorney for Petitioner.

ABRAHAM ENGELMAN,
of Counsel.